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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 375

THE AUTOMOBILE INSURANCE CO., *et al.*,

Petitioners,

—against—

UNITED FRUIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Automobile Insurance Company and 132 others, described as libellants in the Final Decree at page 3a, Record, Vol. I, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The numbered and lettered headings of this petition are designed to conform to similarly numbered and lettered paragraphs of Rule 23 of this Court.

1 (a)

Opinions Below

The opinion of the District Court for the Southern District of New York (Appendix A, p. 7a) is reported at

122 F. Supp. 238. The opinion of the Court of Appeals for the Second Circuit (Appendix A, p. 1a) is not yet officially reported.

1 (b)

The Grounds on Which the Jurisdiction of This Court Is Invoked

(i) The judgment of the Court of Appeals for the Second Circuit, dated June 9, 1955, was entered the same day.

(ii) No petition for a rehearing was filed.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

1. The decision of the Court of Appeals that the admiralty rule of statutory fault affords no presumption against an ocean carrier when it relies on a statutory exemption from liability, is in direct conflict with the decision of the Ninth Circuit in *The Denali*, 105 F. (2d) 413, reargued 112 F. (2d) 952; and of the Fourth Circuit in *Hines* v. *Butler* (*The Virginia*), 278 Fed. 877, affirming *The Virginia*, 264 Fed. 986 (D. of Md.).

2. The decision of the Court of Appeals that application of the doctrine of statutory fault would "engraft on the Fire Statute the condition of compliance with requirements found elsewhere, whether by statute or regulation" (Appendix A, p. 6a), is a misinterpretation of the doctrine which provides a presumption, as a rule of evidence, in satisfaction of the burden of proof resting on the party who claims that the disaster resulted from the negligence of the party guilty of the statutory fault.

3. Both the District Court and the Court of Appeals ruled that in a case of destruction of cargo by fire where

the carrier claims the exemption of the Fire Statute, the cargo owner must prove by specific evidence the cause of the fire and that it resulted from the carrier's negligence, without reliance upon presumptions which are normal in all other types of cases.

4. The proper interpretation and application of the Fire Statute is of immense importance to cargo owners and ocean carriers: A very high percentage of claims of cargo owners against carriers arise out of fire; and the danger of disastrous fires on shipboard is increasing as new chemicals and other cargoes of extremely hazardous nature are offered for carriage.

5. This Court has not taken occasion to consider the Fire Statute since *The Venice Maru*, 320 U. S. 249, decided in 1943. The statement of this Court in that case that the Fire Statute is designed to enable shipowners to offer a rate for cargo transportation only, "without loading it for fire liability", has been interpreted by the lower courts as being in effect a ruling that carriers are exempt from liability for fire, whatever the circumstances.

6. It has frequently been pointed out that one of the greatest deterrents of negligence is sure knowledge that liability for negligent damage will fall upon the wrongdoer. If decisions of the courts make it practically impossible to establish an ocean carrier's liability for fire destruction of cargo—particularly in a case such as the present one where the carrier violated statutory regulations designed to promote safety in the carriage of hazardous cargo, there is little compulsion on an ocean carrier to comply with safety regulations or to exercise common prudence—if it is cheaper not to do so. In the recent case of *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, at page 91, this Court commented that increased dangers under modern conditions "make it all the more necessary that negligence be discouraged".

1 (c)

The Questions Presented for Review

I

When in wilful and direct violation of a statute and of statutory regulations designed to promote safety in the handling of dangerous commodities on vessels, an ocean carrier accepts and stows hazardous cargo which presents the danger that it may cause a fire because of its highly oxidizing character, and there is a fire which may well have been caused by the carrier's violation of the statute and regulations, does not a presumption under the Statutory Fault Rule satisfy cargo's burden under the Fire Statute to establish the cause of the fire and that it resulted from the carrier's negligence?

II

Whatever may have been the initial cause of a fire, if a carrier's wilful statutory fault in the stowage of dangerous cargo inevitably intensified and extended the fire, does not the carrier lose the exemption of the Fire Statute at least so far as concerns cargo stowed in the compartment where the dangerous cargo was illegally stowed?

III

When an ocean carrier bases its defense on the Fire Statute, are not normal inferences to be drawn from the evidence to satisfy cargo's burden of proof under that statute?

1 (d)

The Statutes and Regulations Which the Case Involves

THE FIRE STATUTE

Title 46 U. S. C. Section 182:

"*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

CARRIAGE OF EXPLOSIVES AND DANGEROUS SUBSTANCES

Title 46 U. S. C. Section 170:

(The relevant provisions of this statute appear in Appendix B of this petition.)

EXPLOSIVES OR OTHER DANGEROUS ARTICLES ON BOARD VESSELS

UNITED STATES COAST GUARD REGULATIONS

Title 46 Code of Federal Regulations Part 146:

(The relevant regulations appear in Appendix B of this petition.)

1 (e)

Statement of the Case

The petitioners were the owners of cargo shipped on the S. S. "Shell Bar" at New York in April, 1948, for carriage to West Indian and Central American ports. Respondent was the operator of that vessel and issued the bill of lading contracts.

During the course of the voyage fire broke out in the cargo, and that stowed in two compartments of the vessel sustained serious damage through contact with fire or with water used to extinguish it.

Fire in the vessel's #1 tween deck centered in the cargo stowed in the starboard after end in an area where 100 drums of calcium hypochlorite were stowed in contact with inflammable cargo. The fire in #2 tween deck centered in the starboard side forward, separated only by a steel bulkhead from the area in #1 where the calcium hypochlorite was stowed (Findings 5-6, Record, Vol. I, p. 10A).

Calcium hypochlorite is a bleaching powder of high chlorine content. The Coast Guard Regulations designate it as a dangerous oxidizing commodity which presents the danger of spontaneous decomposition causing evolution of heat and gases which may rupture its containers; and vapors from ruptured containers may ignite spontaneously (Appendix B, pp. 26a, 27a).

Each of the drums of calcium hypochlorite stowed on the "Shell Bar" bore a large notice describing the contents as calcium hypochlorite; each bore a statutory yellow label which, in accordance with the regulations of

the Coast Guard, designated the contents as an oxidizing material or an inflammable solid (Record, Vol. I, p. 116a); and each bore a label reading:

> "WARNING: Strong oxidizing agent, contact with combustible material may cause fire. Keep away from combustible material (Record, Vol. I, p. 118a)."

Because of the dangerous characteristics of calcium hypochlorite, the respondent was forbidden by law to receive for carriage, stow, or carry this commodity unless the respondent complied with very definite regulations of the Coast Guard (Appendix B, pp. 21a, 27a, sec. 146.06-4). The respondent made no effort to comply with these regulations.

The Coast Guard Regulations prohibit a carrier's acceptance of dangerous cargo such as calcium hypochlorite "unless the originating shipping paper" carries the shipper's certification that the dangerous commodities are "properly described by name, and are packed and marked and are in proper condition for transportation according to the Regulations" (Appendix B, pp. 20a, 21a, sec. 146.06-1).

In the case of the "Shell Bar", there was no certificate on the "originating shipping paper" covering "100 drums bleaching powder", that the cargo was properly described, packed or marked, or that it was in proper condition for transportation; nor was it thus certified elsewhere.

To "promote safety" in the handling of the dangerous cargo listed in the Regulations, it was required that such cargo "shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty. * * * such person shall be an officer possessing an unexpired license issued by the U. S. Coast Guard and assigned to such duty by the owner, charterer, agent or master of the vessel" (Appendix B, p. 19a, sec. 146.02-17).

The calcium hypochlorite was not stowed on the "Shell Bar" "under the direction and observation" of a licensed officer. No licensed officer had anything to do with its stowage and respondent did not assign any such officer to supervise the stowage of the calcium hypochlorite or any of the other dangerous cargo stowed on that vessel.

Again "to promote safety" in the carriage of dangerous cargo, the Regulations required that a vessel be supplied with and have on board during such carriage a "Dangerous Cargo Manifest" or "Dangerous Cargo List" (Appendix B, p. 22a, sec. 146.06-12), provided with spaces in which is set out the information which the Regulations demanded. The required information was detailed in the Regulations and included "the classification of the substance" which "shall be shown in enlarged size of letter and underlined in order to be easily distinguished upon the manifest (as for example INFLAMMABLE LIQUID)" (Appendix B, pp. 22a, 23a, sec. 146.06-14).

It was provided that "the master shall by his signature acknowledge the correctness of the dangerous cargo manifest or list" (Appendix B, pp. 23a, 24a, sec. 146.06-15).

No "Dangerous Cargo Manifest" nor "Dangerous Cargo List" was provided the "Shell Bar" by the respondent. She was provided with the usual form of outward manifest and a special stowage list which was not signed by the master. On both appear the words "100 drums bleaching powder" in small type and not underlined, sandwiched in between descriptions of cookies, crackers, flour and other innocuous commodities. The shipment described as "bleaching powder" was nowhere described—even in small type—as either an "oxidizing material" or a "hazardous article" as the Regulations required.

The Regulations required that the Dangerous Cargo Manifest set out the type of label attached to containers

of Dangerous Cargo; *i. e.*: "Yellow Label," "Red Label" etc. (Appendix B, p. 23a, sec. 146.06-14).

On the "Shell Bar" not only was there no Dangerous Cargo Manifest but there was no record on either the outward manifest or on the special stowage list that the 100 drums described as containing "bleaching powder", bore yellow labels. None of respondent's representatives had the duty to ascertain what labels appeared on containers of dangerous cargo; no one assumed that duty and all were ignorant that the 100 drums of calcium hypochlorite bore yellow labels.

The Regulations required that the Dangerous Cargo Manifest set out "the stowage actually provided for the substance (meaning a 'Dangerous Substance') on board the vessel" (Appendix B, p. 23a, sec. 146.06-14).

On the "Shell Bar" nothing whatever appeared on either the outward manifest or the special stowage list concerning the stowage of the "bleaching powder."

Perhaps the provision most important to the present case is the following (Appendix B, p. 24a, sec. 146.06-14).

> "No article of explosives or other dangerous articles or substances shall be on any vessel as cargo unless shown upon a manifest or list" (meaning the special "Dangerous Cargo Manifest" or "Dangerous Cargo List").

The Regulations provided that a Dangerous Cargo Stowage Plan be prepared and that it (Appendix B, pp. 24a, 25a, sec. 146.06-19).

> "shall show in all necessary detail *the exact location of the stowage of such explosives, articles or substances.* The descriptive name thereof as given in the commodity list herein shall be the name used to

identify these explosives, or other dangerous articles or substances. Trade names, marks or other designations shall not be used to identify the dangerous cargo shown upon the stowage plan or list. When articles defined by the regulations in this part as dangerous are stowed in a compartment in which other cargo not of a dangerous nature is stowed, *such other cargo that is stowed nearest adjacent to the dangerous articles of cargo shall be accurately described and identified on the stowage plan or list.*" (Italics ours.)

The stowage plan which respondent provided the "Shell Bar", did not show that there was either bleaching powder or calcium hypochlorite on the vessel: it merely depicted a block at the starboard after end of #1 tween deck marked "Special Stowage Cargo." There was nothing on the stowage plan or special stowage list which disclosed what was "stowed nearest adjacent" to the calcium hypochlorite.

In summary, the respondent sent the "Shell Bar" to sea with dangerous cargo which it had stowed without the shipper's certification and without supervision by a licensed officer; without any data on board to advise the officers as to how the dangerous calcium hypochlorite had been stowed and what cargo was stowed adjacent to it; indeed, without any data that this dangerous yellow label cargo had been stowed in #1 tween deck or anywhere else on the vessel.

As the Regulations specifically prohibited an ocean carrier from accepting for transportation, stowing or carrying both bleaching powder and calcium hypochlorite unless the carrier satisfied the conditions mentioned above—and the respondent satisfied none of these conditions—we submit that the calcium hypochlorite was illegally on the "Shell Bar" at the time of the fire.

Under the circumstances the master had not complied with the Coast Guard Regulations and ordered an inspection during the voyage of the calcium hypochlorite "to insure that such cargo is carried with safety and that no damage caused by shifting cargo, spontaneous heating, leaking or sifting of containers, or from other causes, has been sustained since loading and stowage" (Appendix B, p. 19a, sec. 146.02-12).

Respondent had violated the regulations and carried dangerous cargo on its vessels in defiance of the law for many years (Record, Vol. I pp. 17a-21a).

OPINIONS BELOW

The District Court found (Appendix A, pp. 11a, 12a):

> "Libellants have failed to sustain their burden of proof by the requisite quantum of evidence that that fire and consequent damage was proximately caused by the nature of the stowage of the cargo aboard the SHELL BAR that such stowage was negligent, and that the personal neglect of respondent was the proximate cause of the damage."

It did not discuss the Rule of Statutory Fault although cargo stressed that principle.

The Court of Appeals assumed that the drums of calcium hypochlorite, which it described as bleaching powder, were carried by the respondent in violation of law (Appendix A, p. 5a); but it held (Appendix A, p. 6a):

> "The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with other statutes or with Coast Guard Regulations.
>
> • • • •
>
> "There are no exceptions other than those expressed in the statute itself, viz., 'Unless such fire is caused by the design or neglect of such owner.' We are not justified, in applying the doctrine of statutory fault,

to engraft on the Fire Statute the condition of compliance with requirements found elsewhere, whether by statute or regulation."

"• • • We are unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for proof of cause required by statute."

The Court of Appeals found that the evidence supported the finding of the District Court "that the first indication of fire was in both No. 1 and No. 2 compartments." It also said: "The state of the proof at the conclusion of the case did not require a finding that the manner of stowage of the drums had caused the fire." "On all the evidence the District Judge was justified in making the negative finding (Finding 9) that the libellants had failed to sustain their burden of showing that the fire was caused by the drums of bleaching powder or by their improper stowage."

1 (h)

Argument for Allowance of the Writ

QUESTION I

When in wilful and direct violation of a statute and of statutory regulations designed to promote safety in the handling of dangerous commodities on vessels, an ocean carrier accepts and stows hazardous cargo which presents the danger that it may cause a fire because of its highly oxidizing character, and there is a fire which may well have been caused by the carrier's violation of the statute and regulations, does not a presumption under the Statutory Fault Rule satisfy cargo's burden under the Fire Statute to establish the cause of the Fire and that it resulted from the carrier's negligence?

Although cargo is completely under the control of an ocean common carrier both when the cargo is stowed and

when a fire subsequently breaks out, our courts have construed our Fire Statute as throwing upon the cargo owner, who has no representative on the vessel, the burden of proving the cause of a fire and that it resulted from the ocean carrier's negligence.

In *Consumers Co.* v. *Kabushiki Kaisha (The Venice Maru)*, 320 U. S. 249, this Court commented that the policy underlying the Fire Statute is to enable shipowners to offer a rate for cargo transportation only, "without loading it for fire liability." In cases filed by cargo owners against carriers to recover for destruction of cargo by fire since that decision, carriers invariably cite it in support of the argument that in practical effect the carrier is exempt from liability for the destruction of cargo by fire whatever the circumstances.

In *The Venice Maru* this Court was considering a case where the cargo owners had not established that the vessel owner's personal negligence led to the fire; and the language which this Court employed, quoted above, apparently was to rationalize the anomalous burden which the decisions throw upon cargo in a fire case.

While we are forced to accept the burden of proof which the decisions of our courts have cast upon us, that burden, we submit, may be satisfied by presumptions as well as by direct evidence. When a carrier wilfully violates regulations promulgated for safety in the carriage of cargo and there is a fire which could readily have resulted from the carrier's violation of the regulations, it is, we think, but a logical presumption that the fire resulted from that violation. That is the principle of *The Pennsylvania*, 86 U. S. 125, where this Court said (at p. 136):

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule

> intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

That principle has been applied for many years in both collision cases and cases against carriers for loss of cargo.

> *Richelieu & O. Nav. Co.* v. *Boston Mar. Ins. Co.*, 136 U. S. 408, 422-3;
> *The Princess Sophia*, 61 F. (2d) 339, 347 (C. A. 9);
> *The Denali*, 105 F. (2d) 413, reargued 112 F. (2d) 952 (C. A. 9).

In *The Denali, supra,* the vessel stranded as the result of negligent navigation and her cargo was lost. The vessel owner filed a petition for exoneration from liability under Section 3 of the Harter Act* and for statutory

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* 46 U. S. C. Sec. 192. "*Limitation of liability for errors of navigation, dangers of the sea, acts of God.* That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

limitation of liability under 46 U. S. C. 183.** It was found that the vessel was being operated in violation of a statute which required that the mates stand watches totaling not more than eight hours per day. It was also found that the vessel owner was in privity with the established practice on its vessels of violating the requirement of the statute mentioned. In the original opinion and in the opinion on reargument, the court discussed various cases which had applied the principle of *The Pennsylvania, supra,* including collision and personal injury cases and cases for loss of cargo resulting from strandings. We think that this headnote (at 112 F. (2d) 953) fairly summarizes the principle applied:

> "Where the vessel has violated the positive command of a safety statute designed to prevent fatigue in the navigating officer who is controlling her navigation at the time that navigation caused injury, presumption is applicable that violation of statute was a contributing cause so as to impose burden on vessel owners of proving that violation could not have caused the error in navigation, irrespective of whether vessel collided with another vessel or with reef on which she stranded. 46 U. S. C. A. sec. 223."

It was held that the carrier was not entitled to the statutory exemption of the Harter Act, that it was liable for the loss of the cargo and was not entitled to the statutory limitation of its liability, because the carrier was fully informed of the long established practice of violating the safety statute.

** "*Liability of owner not to exceed interest.* The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

We submit that application of the principle of statutory fault is just as salutary in a case against a carrier which relies on a statutory exemption against liability for fire as in a collision case (*The Pennsylvania, supra*), or in a case where a carrier is seeking a statutory exemption from liability under the Harter Act or a statutory limitation of liability (*The Denali, supra*).

In the present case the carrier's managing officers were fully informed of the established practice of stowing its vessels in violation of the regulations designed to promote safety in the carriage of hazardous cargo.

We submit that the language employed by the Court of Appeals discloses that it misapprehended the principle of the Rule of Statutory Fact. That Rule is one of presumption affording evidence against the party guilty of the fault. No question of engrafting one statute on another is presented.

That the Court below completely misapprehended the Rule is made particularly clear by this language (Appendix A, p. 7a):

> "In any event libellants can have no recourse to the doctrine of statutory fault because there is lack of evidence here that any statutory fault was a proximate cause of the fire."

QUESTION II

Whatever may have been the initial cause of a fire, if a carrier's wilful statutory fault in the stowage of dangerous cargo inevitably intensified and extended the fire, does not the carrier lose the exemption of the Fire Statute at least so far as concerns cargo stowed in the compartment where the dangerous cargo was illegally stowed?

Whether the fire started in #2 tween deck and spread to #1 or in both compartments simultaneously, the pres-

ence of the outlawed calcium hypochlorite at the starboard after end of the #1 tween deck and its stowage adjacent to such inflammable cargo as paper bags could not help but be an active cause of the fire destruction of the cargo in #1 tween deck.

Subsequent to the fire, many of the drums which had contained calcium hypochlorite were found with holes corroded through their sides, with their seams opened up by internal pressure and with their contents missing (Record, Vol. I, p. 86a). The Court of Appeals said "There was no evidence which excluded the possibility that the drums had ruptured and leaked their contents because of the intense heat to which they had been subjected in the fire."

Whatever may have been the cause of the opening up of the drums, the scattering of their contents of highly oxidizing material, illegally on the vessel, was bound greatly to intensify and spread the fire. The greatest area of damage was in the immediate vicinity of the drums of calcium hypochlorite; and outside that area the damage was light and on top of the stow (Record, Vol. I, pp. 90a, 91a).

In *Hines* v. *Butler* (*The Virginia*), 278 Fed. 877 (C. A. 4), the initial cause of the fire which destroyed the vessel and her cargo was not established (see decision of District Court, 264 Fed. 986 at p. 990). The carrier was not afforded the protection of the Fire Statute and was held liable for the loss of the cargo because, in violation of a statute, the vessel's fire fighting equipment was in grossly faulty condition by reason of the carrier's negligence; and the fire spread throughout the vessel because the fire fighting equipment was inoperative.

QUESTION III

When an ocean carrier bases its defense on the Fire Statute, are not normal inferences to be drawn from the evidence to satisfy cargo's burden of proof under that statute?

The respondent offered no evidence or argument as to the cause of the fire. Respondent's employees at time of trial, including the master and chief officer, testified that they had no explanation of its cause; and that they did not know if it broke out in #1 tween deck and spread to #2 or in #2 tween deck and spread to #1, or if it broke out simultaneously in both tween decks (Record Vol. I, pp. 79a, 80a; Vol. II, p. 30b). Apparently both courts below accepted the phenomenon that the fire may have broken out in both tween decks at the same time; and, as they were separated by a steel bulkhead, from two distinct but unexplained causes.

We are faced with the negative conclusion of the District Court, approved by the Court of Appeals, that it was not established that the fire started in the after end of #1 tween deck where the calcium hypochlorite was stowed in contact with paper bags. The rationale of that negative conclusion is impossible to comprehend if normal inferences are drawn from the undisputed evidence.

(1) No outside agency could have caused the fire for the hatches had been battened down during the whole voyage (Record, Vol. I, pp. 75a, 76a); there was nothing in either the #1 or #2 compartments which presented any danger of a spontaneous fire; and indeed there was nothing that presented any danger of any kind except the drums of calcium hypochlorite stowed in contact with

paper bags and other inflammable cargo in the after end of #1 tween deck (Record, Vol. I, p. 95a).

(2) Immediately after the disaster the master made his statutory Casualty Report to the Coast Guard where he reported that "fire of unknown origin started in #1 hold and spread to #2 hold;" (Record, Vol. I, p. 63a).

(3) The master formally reported in writing to his owners immediately after the fire that the fire broke out in #1 tween deck (Record, Vol. I, p. 79a).

(4) The master stated under oath to the Coast Guard investigating officer that the fire broke out in #1 compartment and spread to #2 (Record, Vol. I, p. 65a).

(5) The chief engineer's log book set out that the fire broke out in #1 compartment.

(6) The respondent's general average surveyor went on board the vessel, entered the cargo compartments immediately upon her arrival at Norfolk, made notes of the conditions he found (Record, Vol. I, p. 85a), and stated in letters and in his formal report, that the fire originated in the after end of #1 tween deck in the vicinity of the calcium hypochlorite (Record, Vol. I, pp. 91a-94a).

The District Court held (Appendix A, p. 11a):

> "The facts that fire occurred in two holds of the vessel and that the 100 steel drums were stowed in one of these in proximity to wood, paper and burlap, do not establish the stowage of the drums as such cause by the requisite quantum of evidence of which libellant has the burden."

The court did not consider the evidence establishing that there was no other possible cause of the fire.

Surely there is nothing so peculiar about the Fire Statute as to foreclose the application of normal presumptions and inferences. Nevertheless, the Court of Appeals held that the evidence did not compel a finding that the fire started in #1 tween deck; and that it resulted from the stowage of the calcium hypochlorite in contact with inflammable cargo.

WHEREFORE your petitioners respectfully pray that writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings of the case entitled on its docket "*Automobile Insurance Company of Hartford, Connecticut, et al.* v. *United Fruit Company,* Docket No. 23289;" and that the said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as this Court may seem meet and just; and your petitioners will ever pray.

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

BURKE, *District Judge:*

Libellants were the owners of cargo or underwriters insuring cargo shipped on respondent's S. S. Shell Bar for carriage to Havana and Central American ports. The vessel sailed from New York on the afternoon of May 1, 1948. Libellants' cargo was damaged or destroyed by a fire which broke out in the early morning of May 3, 1948, when the vessel was off Cape Hatteras. Libellants filed libels claiming that the damage was caused by the negligence of respondent. Respondent's defense was based (1) on the Fire Statute, 46 U. S. C. A. 182, which exempts an owner from liability for loss or damage to cargo due to fire "unless such fire is caused by the design or neglect" of the owner of the vessel (a bareboat charterer is deemed an owner, 46 U. S. C. A. 186), and (2) on the Carriage of Goods by Sea Act, 46 U. S. C. A. 1304(2)(b), which provides that, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from— (b) fire, unless caused by the actual fault or privity of the carrier." Libellants' claim of negligence on the part of the respondent related to acceptance for shipment and the manner of stowage of 100 steel drums, each containing 100 lbs. of bleaching powder, known also by the trade name "Perchloron", manufactured and packed by Pennsylvania Salt Manufacturing Co., Philadelphia, Pa. Each of the drums had affixed a yellow label on which was printed in large letters, "Calcium Hypochlorite", and the legend in smaller type: "Active ingredient calcium hypochlorite not less than 70% by weight. —Warning: Strong Oxidizing agent, contact with combustible material may cause fire. Keep away from combustible material. Keep

covered when not in use. Store in a cool, dry place." The drums were stowed in No. 1 'tween-deck compartment, a few feet aft of the hatch coaming on the starboard side, running inboard about a dozen feet, three rows deep and three tiers high. They were stowed on wooden dunnage and against wooden cargo battens on the starboard side. In the same compartment and aft of the drums were stowed wooden cases containing motors placed against the bulkhead, one case wide and about three feet high, and on top of these cases, 1200 paper bags of talc extending forward to the drums of bleaching powder. In the same compartment and in the vicinity of the drums were quantities of shellac in burlap bags and baled piece cotton-goods covered with paper. The District Court found that libellants had failed to sustain their burden of showing that the fire was caused by the bleaching powder, or that the stowage was negligent, or that the manner of stowage was the proximate cause of the fire (Finding No. 9).

Libellants argue that negligent stowage causing the fire may be inferred from the proof that the fire started in the after end of No. 1 'tween-deck. They contend also that the fire resulted from contact of the bleaching powder with combustible material, either dunnage or cargo stowed in the immediate vicinity. The claim that the fire started in the after end of No 1 'tween-deck is based on certain documentary evidence, on testimony regarding the concentration of fire damage and on certain answers of the ship's Master on interrogation by the United States Coast Guard Investigating Officer when the vessel arrived at Norfolk. Without reciting in detail the evidence relied on by libellants to sustain their claim in this respect, it is sufficient to say that that was not all the evidence. The Chief Officer who first discovered the fire, the Master who arrived on the bridge a few minutes after the discovery of the fire, and the general average surveyor who examined the vessel and damaged cargo at Norfolk two days

after the fire, all testified at the trial that they could not determine where the fire started or what caused it. The District Court found that the first indication of fire was in both No. 1 and No. 2 compartments (Finding No. 4). There is ample support in the evidence to sustain that finding.

Libellants argue that a number of drums which had contained bleaching power were found, upon discharge of the damaged cargo at Norfolk, to have corroded through and that the seams of a number of them had been opened up by internal pressure, and that the contents of the drums were missing. They argue on the basis of expert testimony that calcium hypochlorite is an oxidizing material which presents the danger of spontaneous decomposition leading to corrosion or rupture of its containers, and that if it comes in contact with combustible cargo the danger of a fire of great intensity is presented. Since there was no other cargo in No. 1 'tween-deck which presented any danger of spontaneous combustion, and since there was no possibility of any external agency having caused the fire, they argue that they have discharged the burden of showing that the manner of stowing the bleaching powder caused the fire, because they have shown conditions and circumstances from which that inference could reasonably be drawn.

The condition of the drums when they were examined at Norfolk was their condition after they had been subjected to the intense heat of the fire. There was no evidence which excluded the possibility that the drums had ruptured and leaked their contents because of the intense heat to which they had been subjected in the fire. The question here is not whether the evidence would support an inference that spontaneous combustion within the drums and the resulting leakage of the contents and resulting oxidation upon coming in contact with combustible material had caused the fire. The question is whether

the proof compelled such an inference. Cases such as *Standard Oil Co.* v. *R. L. Pitcher Co.*, 1 Cir., (1923), 289 Fed. 678 and *The Edmund Fanning*, 2 Cir., (1953), 201 F. 2d 281, cited by libellants, do not sustain their argument. In the *Standard Oil* case the jury had found a verdict in favor of the plaintiffs, based on the claim that the defendant's negligence had caused the fire which resulted in damage to the plaintiff. On appeal the Court merely held that it could not say as a matter of law that such finding was clearly wrong. In *The Edmund Fanning* the District Judge had found that the Government, having sustained cargo damage due to fire while the ship was in port at Genoa, Italy, had the burden of showing that the stowage was improper due to the negligence of Isbrandtsen, the charterer of the vessel, and the burden of showing that the negligent stowage had caused the fire, and had found that the Government had met this burden by the proof. On appeal this Court held that the District Judge did not err in holding that the Government had met this burden. Here the libellants have had no finding that the respondent's negligence caused the fire. The state of the proof at the conclusion of the case did not require a finding that the manner of stowage of the drums had caused the fire. There was evidence that the fire was first discovered at 5:43 A. M., that smoke and flames were seen coming out of the four ventilators leading from compartments No. 1 and No. 2, that the smoke was heavy and black, the kind of smoke usually made by a general cargo fire, not the grayish haze characteristic of decomposing calcium hypochlorite, that about twelve minutes later No. 2 hatch blew up, lifting heavy hatch covers weighing in excess of a ton each, that it was the fire in No. 2 hatch which was the most difficult to extinguish, and that the damage sustained in No. 2 hatch was just about the same as the damage in No. 1. On all the evidence the District Judge was justified in making the negative finding (Find-

ing No. 9) that the libellants had failed to sustain their burden of showing that the fire was caused by the drums of bleaching powder or by their improper stowage. *Hoskyn & Co.* v. *Silver Line*, 2 Cir., (1944), 143 F. 2d 462, 465, cert. den. 323 U. S. 767.

Libellants contend that the respondent was guilty of statutory fault in transporting the drums of bleaching powder in violation of Coast Guard Regulations, and that the statutory fault doctrine established by *The Pennsylvania*, 86 U. S. 125, applies to proof of the cause of a fire resulting in cargo damage. Sec. 170(6) of Title 46 U. S. C. A. provides that it is unlawful to stow or transport dangerous cargo on a vessel except in accordance with regulations established by the Coast Guard. Subdivision (8) of the same section provides that a carrier "shall refuse to transport" dangerous cargo in violation of the provisions of the statute or of the Coast Guard Regulations. The Coast Guard adopted appropriate regulations, Code of Federal Regulations, Title 46, establishing a list of commodities described as "Dangerous Articles", including calcium hypochlorite, and placing certain obligations on carriers of such cargo requiring shippers' certification as to description, packing, marking, etc., and requiring that such cargo be stowed under direction and observation of a qualified officer licensed by the Coast Guard, and requiring a "Dangerous Cargo Manifest" and a "Dangerous Cargo Stowage Plan" and prohibiting the carriage of "Dangerous Articles" or substances as cargo unless shown on the manifest. For purposes of this discussion we shall assume that the drums of bleaching powder were being transported in violation of statute and Coast Guard Regulations.

Since 1851 in this country an owner of a vessel has had total exemption from liability in all cases of loss by fire, except those caused by his design or neglect. Rev. Stat. Sec. 4282, Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635.

Providence & New York Steamship Co. v. ***Hill Manufacturing Co.***, 109 U. S. 578, 602. The purpose of the statute was to put American shipping on an equality with that of other maritime nations, ***The Main*** v. ***Williams***, 152 U. S. 122, 128, by enabling shipowners to offer a rate for transportation only, "without loading it for fire liability." ***Consumers Co.*** v. ***Kabushiki Kaisha***, 320 U. S. 249, 255. The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with other statutes or with Coast Guard Regulations. ***Earle & Stoddart*** v. ***Wilson Line***, 287 U. S. 420, 425. ***The Rio Gualeguay***, 5 Cir., (1953), 205 F. 2d 886, 888, cert. den. 346 U. S. 915. There are no exceptions other than those expressed in the statute itself, viz., "unless such fire is caused by the design or neglect of such owner." We are not justified, in applying the doctrine of statutory fault, to engraft on the Fire Statute the condition of compliance with requirements found elsewhere, whether by statute or regulation. To allow the application of the doctrine of statutory fault to supply the necessary evidence to satisfy the cargo interest's burden of proof of establishing that the fire was caused by the design or neglect of the owner would serve to emasculate the Fire Statute by diluting the owner's immunity from fire loss liability.

We think that congress intended as a condition for recovery for damage due to fire loss to place the burden on cargo interests of establishing that the fire was caused by the design or neglect of the owner. Since 1851 there has been no indication of congressional intent to relieve cargo interests of that burden. The exemption provided by the Carriage of Goods by Sea Act, enacted in 1936, 46 U. S. C. A. 1304(2)(b), was the same as that provided by the Fire Statute, and the purpose of the exemption was the same. ***A/S J. Ludwig Mowinckels Rederi*** v. ***Accinanto, Limited***, 4 Cir., (1952), 199 F. 2d 134, 144, cert. den. 345 U. S. 992. Congress thus extended the benefits of the

Fire Statute to a "carrier" though not a shipowner, or an owner *pro hac vice*. No case has been called to our attention which would indicate a tendency on the part of the courts to relieve cargo interests of that burden. We think it significant that no court has applied the doctrine of statutory fault in a case involving the exemption provided by statute. We are unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for proof of cause required by statute. To do so would at times result in shifting the burden of proof to the owner of a vessel by requiring him to show freedom from fault. This we believe would undermine the very purpose of the statutory exemption. In any event libellants can have no recourse to the doctrine of statutory fault because there is lack of evidence here that any statutory fault was a proximate cause of the fire.

Since in our view the District Judge did not err in holding that libellants had not proved that the fire was caused by the drums of bleaching powder or by their improper stowage, there is no need for us to consider the question whether respondent was personally negligent.

Affirmed.

Opinion of the United States District Court for the Southern District of New York

MURPHY, *D. J.*:

This consolidated cause involving claims for damage to cargo caused by fire on board a vessel, having been tried to the court, the following are made

FINDINGS OF FACT

1. At all times herein mentioned libelants were cargo owners and underwriters insuring cargo damaged by fire

on board the motor vessel SHELL BAR while enroute from New York to Havana and Central American ports in May, 1948. Libelants are various corporations and co-partnerships, some domiciled in New York, others elsewhere; some having offices for transaction of business in this judicial district, and others having such offices elsewhere.

2. At all such times, respondent, a New Jersey corporation with office and place of business within this judicial district, was chartered owner in possession of the M/V SHELL BAR, which it operated as a merchant vessel in common carriage of merchandise for hire between the port of New York and other ports.

3. In the latter part of April, 1948, certain shippers delivered shipments which are the subject of this action to respondent as a common carrier at the port of New York for transportation to various other ports and delivery to certain consignees. Respondent accepted at New York such shipments and issued to such shippers its bills of lading therefor, agreeing to transport and deliver these shipments in consideration of freights paid or agreed to be paid according to the terms of the bills of lading. These shipments were loaded on board the M/V SHELL BAR.

4. The M/V SHELL BAR, a C-1 MAVI type vessel, of 3805 gross tons, diesel propelled, with engines and one cargo compartment aft and three cargo compartments forward, and cargo space ventilated by electric blower fans, sailed from New York at 4:01 P. M., May 1, 1948, bound for Havana. Outside air temperatures ranged from 50-65 degrees F. the first day, 48-66 degrees F. on May 2, and 78 degrees F. in the morning of May 3, prior to the fire. Until midnight of May 2, the winds ranged from calm to force 3, and thereafter until time of the

fire, from force 5 to 6. At 5:43 A. M. on May 3, a fire in No. 1 and No. 2 holds was indicated by automatic smoke devices as well as by observation of flames and black smoke from ventilators in the forward mast house leading from the No. 1 and No. 2 holds. These ventilators were closed and the fire fought principally with CO^2 and also with water in the two holds. The No. 2 hatch with heavy steel pontoons and covered by three battened down tarpaulins, then blew up. The vessel changed its course to put into Norfolk where the fire was ultimately extinguished.

5. Compartment damage occurred in the afterend of No. 1 upper 'tweendeck and the forward end of No. 2 upper 'tweendeck holds, with structural damage of plate buckling in both compartments.

6. Cargo in No. 1 upper 'tweendeck compartment included 100 drums of bleaching powder that were stowed a few feet aft of the hatch coaming on the starboard side, running inboard about a dozen feet, three rows deep and three tiers high. The drums were stowed on wooden dunnage and against wooden cargo battens on the starboard side of the compartment. Other cargo in this compartment comprised wooden cases containing motors against the bulkhead across the vessel, one case wide and about three feet high, and on top of these cases, 1200 paper bags of talc extending forward to the drums of bleaching powder. Additional items stowed in the vicinity of the drums included quantities of shellac in burlap bags and baled piece goods of cotton or jute covered with paper.

7. Each of the 100 drums of steel had affixed a yellow label printed "Calcium Hypochlorite," and in addition a label with this legend in smaller type: "Active ingredient calcium hypochlorite not less than 70% by weight. • • •

Appendix A

Warning: Strong oxidizing agent, contact with combustible material may cause fire. Keep away from combustible material. Keep covered when not in use. Store in a cool, dry place."

8. The drums which had been received at Pier 9, North River, New York, were loaded by respondent's stevedores in accordance with a general stowage plan prepared by such stevedores in conjunction with the ship's officers.

9. Libelants have failed to sustain their burden of proof by a preponderance of the evidence that the fire was caused in fact by the drums in question, that the stowage of the drums was negligent and that such negligent stowage was the proximate cause of the fire and consequent damage complained of.

Discussion

Normally a common carrier as insurer is *prima facie* liable to the owner of cargo for its non-delivery or damage in carriage. Concededly, however, in event of damage caused by fire, an exception is made. Under the Fire Statute, no shipowner is liable for loss or damage by fire "unless such fire is caused by the design or neglect of such owner."[1] The applicable provisions of the Carriage of Goods by Sea Act phrase the exception in similar language, "unless caused by the actual fault or privity of the carrier."[2] As bareboat charterer, respondent is considered an owner.[3] The principal issue in this case accordingly is whether libelants have established by a preponderance of the evidence respondent's personal fault as proximate cause of the fire and its attendant damage. The alleged personal fault of respondent was negligent stowage of the 100 drums of bleaching powder.

Assuming respondent's employees failed to have on

board a "dangerous cargo manifest" or "list," and that such was required for the 100 drums in question as a dangerous article within the regulations of the Coast Guard,[4] it is far from establishing a cause of the fire. The facts that fire occurred in two holds of the vessel and that the 100 steel drums were stowed in one of these in proximity to wood, paper and burlap, do not establish the stowage of the drums as such cause by the requisite quantum of evidence of which libelant has the burden.[5]

Moreover, we do not believe that, measured by an external standard,[6] an appreciable risk of fire was unjustifiably created by stowing the 100 steel drums in the manner in which they were stowed aboard the SHELL BAR. It may be that a sufficiently appreciable risk of combustion would result from contact of the contents of the drums in question with carbonaceous material, such as wood; but not from mere contact of the drums with such material. Notwithstanding a possibility of the oxidizing of the contents and consequent rupture of their containers, it is not unreasonable, in the light of the necessities of maritime cargo stowage, to employ wooden dunnage and battens in contact with the steel drums. Absent proof by the requisite preponderance of evidence of the creation of such risk and of such risk as the proximate cause of the fire, it is unnecessary to consider whether any supposed fault was "personal" to the respondent.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter of this controversy.

2. Libelants have failed to sustain their burden of proof by the requisite quantum of evidence that the fire and consequent damage was proximately caused by the nature of the stowage of the cargo aboard the SHELL BAR,

that such stowage was negligent, and that the personal neglect of respondent was the proximate cause of the damage.

3. The libels are accordingly dismissed.

Decree accordingly.

Dated, New York, N. Y., June 29, 1954.

(sgd.) THOS F. MURPHY
U. S. D. J.

Footnotes

[1] 46 U. S. C. A. § 182.

[2] *Id.* § 1304 (2) (b).

[3] *Id.* § 186.

[4] 46 C. F. R. 146.06-12 to 146.06-19. See 46 U. S. C. A. § 170.

[5] See *Hoskyn & Co., Inc., et al.* v. *Silver Line, Limited,* 2 Cir., 143 F. 2d 462 at page 463; *The Cabo Hatteras,* D. C. S. D. N. Y., 5 F. Supp. 725 at page 729.

[6] See *The Germanic,* 196 U. S. 589 at pages 595-596; *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp.,* D. C. S. D. N. Y., 112 F. Supp. 630 at page 637.

Appendix A

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June one thousand nine hundred and fifty-five.

Present—HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges,
HON. HAROLD P. BURKE,
District Judge.

AUTOMOBILE INSURANCE CO. OF HARTFORD, CONNECTICUT, et al.,
Libellants-Appellants,

v.

UNITED FRUIT COMPANY,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs taxed in favor of the appellee.

/s/ A. DANIEL FUSARO
Clerk.

APPENDIX B

Carriage of Explosives or Dangerous Substances

TITLE 46 U. S. C. SEC. 170

TRANSPORTATION, ETC. OF OTHER EXPLOSIVES OR OTHER DANGEROUS ARTICLES; EXCEPTIONS

(6) (a) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use (except as fuel for its own machinery) on board any vessel, except one specifically exempted by paragraph (b) of this subsection, any other explosives or other dangerous articles or substances, including inflammable liquids, inflammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous articles or substances, hazardous articles, and ships' stores and supplies of a dangerous nature, except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: Provided, That all of the provisions of this subsection relating to the transportation, carrying, conveying, storing, stowing, or use of explosives or other dangerous articles or substances shall apply to the transportation, carrying, conveying, storing, stowing, or using on board any passenger vessel of any barrels, drums, or other packages of any combustible liquid which gives off inflammable vapors (as determined by flashpoint in open cup tester as used for test of burning oil) at or below a temperature of one hundred and fifty degrees Fahrenheit and above eighty degrees Fahrenheit.

(b) This subsection shall not apply to—

(i) vessels not exceeding fifteen gross tons when not engaged in carrying passengers for hire;

(ii) vessels used exclusively for pleasure;

(iii) vessels not exceeding five hundred gross tons while engaged in the fisheries;

(iv) tugs or towing vessels: Provided, however, That any such vessel when engaged in towing any vessel that has explosives, inflammable liquids, or inflammable compressed gases on board on deck, shall be required to make such provisions to guard against and extinguish fire as shall be prescribed by the Commandant of the Coast Guard;

(v) cable vessels, dredges, elevator vessels, fireboats, ice-breakers, pile drivers, pilot boats, welding vessels, salvage and wrecking vessels;

(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title.

REGULATIONS FOR PROTECTION AGAINST HAZARDS CREATED BY EXPLOSIVES OR OTHER DANGEROUS ARTICLES.

(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsection (3), (5), or (6) of this section apply—

(a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names, packing, marking, labeling, and certification of such explosives or other dangerous articles or substances; with respect to the specifications of containers for explosives or other dangerous articles or sub-

stances; with respect to the marking and labeling of said containers; and shall accept and adopt for the purposes above mentioned in this subsection such definitions, descriptions, descriptive names, classifications, specifications of containers, packing, marking, labeling, and certification of explosives or other dangerous articles or substances to the extent as are or may be established from time to time by the Interstate Commerce Commission insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water. The Commandant of the Coast Guard shall also establish regulations with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessel; with respect to the disposition of any explosives or other dangerous articles or substances found to be in an unsafe condition; with respect to the necessary shipping papers, manifests, cargo-stowage plans, and the description and descriptive names of explosives or other dangerous articles or substances to be entered in such shipping documents; also any other regulations for the safe transportation, carriage, conveyance, storage, stowage, or use of explosives or other dangerous articles or substances on board such vessels as the Commandant of the Coast Guard shall deem necessary; and with respect to the inspection of all the foregoing mentioned in this paragraph. The Commandant of the Coast Guard may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and of such other organizations whose services he may deem to be helpful.

(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall, insofar as applicable to them, respectively, be binding upon shippers and the

owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: Provided, That this section shall not be construed to prevent the transportation of military or naval forces with their accompanying munitions of war and stores.

(c) Nothing contained in this section shall be construed to relieve any vessel subject to the provisions of this section from any of the requirements of title 52 (secs. 4399 to 4500, inclusive) of the Revised Statutes or Acts amendatory or supplementary thereto and regulations thereunder applicable to such vessels, which are not inconsistent herewith.

(d) Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

(e) The United States Coast Guard shall issue no permit or authorization for the loading or discharging to or from any vessel at any point or place in the United States, its territories or possessions (not including Panama Canal Zone) of any explosives unless such explosives, for which a permit is required by the regulations promulgated pursuant to this section, are packaged, marked, and labeled in conformity with regulations prescribed by the Interstate Commerce Commission under section 835 of Title 18, and unless such permit or authorization specifies that the limits as to maximum quantity, isolation and remoteness established by local, municipal, territorial, or State authorities for each port

shall not be exceeded. Nothing herein contained shall be deemed to limit or restrict the shipment, transportation, or handling of military explosives by or for the Armed Forces of the United States.

MASTERS, OWNERS, ETC. REQUIRED TO REFUSE UNLAWFUL TRANSPORTATION OF EXPLOSIVES OR OTHER DANGEROUS ARTICLES

(8) Any master, owner, charterer, or agent shall refuse to transport any explosives or other dangerous articles or substances in violation of any provisions of this section and the regulations established thereunder, and may require that any container or package which he has reason to believe contains explosives or other dangerous articles or substances be opened to ascertain the facts.

United States Coast Guard Regulations

Explosives or Other Dangerous Articles on Board Vessels

TITLE 46 CODE OF FEDERAL REGULATIONS, PART 146

146.01-1 *Purpose of regulations.*—The purpose of the regulations in this sub-chapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States including its territories and possessions excepting only the Panama Canal Zone, and to make more effective the provisions of the International Convention for Safety of Life at Sea, 1929, relative to the carriage of dangerous goods.

Appendix B

146.02-12 *Inspection of cargo.*—(a) On all vessels, other than barges and magazine vessels storing explosives, an inspection of cargoes of explosives or other dangerous articles or substances shall be ordered by the master of the vessel during a voyage to insure that such cargo is carried with safety and that no damage caused by shifting cargo, spontaneous heating, leaking or sifting of containers or from other causes has been sustained since loading and stowage. On such vessels that have dangerous cargo stowed on board for a period exceeding twenty-four (24) hours temperature readings shall be taken at proper intervals and such temperatures recorded and retained as a record for each voyage. When any cargo is discovered to be in a dangerous condition from leakage, sifting, heating, wetting or other causes, such condition shall be corrected in such manner as the judgment of the master may dictate. All unusual circumstances divulged during inspection of dangerous cargo and any action taken as a result thereof shall be a subject for log entry.

146.02-17 *Handling and stowage of cargo.*—Explosives or other dangerous articles or substances as cargo shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty. For vessels engaged in voyages coastwise, or on rivers, bays, sounds or lakes, including the Great Lakes when the voyage is not foreign-going, such person may be an employee of the vessel owner or charterer and so assigned by said owner or charterer or he may be a licensed officer attached to the vessel and assigned by the master of the vessel. For domestic vessels engaged in voyages foreign-going or intercoastal such person shall be an officer possessing an unexpired license issued by the U. S. Coast Guard and assigned to such duty by the owner, charterer, agent or master of the vessel. For foreign vessels such person shall be an officer of the vessel assigned to such duty by the master of the vessel.

Appendix B

146.05-11 *Certification.*—(a) The shipper offering for transportation by vessels subject to these regulations any Class A or Class B explosive and blasting caps or electric blasting caps in any quantity, and any inflammable liquid, inflammable solid, oxidizing material, corrosive liquid, compressed gas, or poison, requiring labels, shall show the following certificate in the lower left-hand corner of the originating shipping paper over the written or stamped facsimile signature of the shipper or of his duly authorized agent:

> This is to certify that the above articles are properly described by name, and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

146.05-17 *Labels.*—(a) Shippers shall furnish and attach the labels prescribed for their packages.

(b) Labels shall not be applied to packages containing articles which are not subject to the regulations in this part.

(c) Shippers shall not apply labels which by their size, shape and color, may readily be confused with standard caution labels prescribed herein.

(g) Yellow label for inflammable solids and oxidizing materials.

146.06-1 *Acceptance on board vessels.*—Explosives or other dangerous articles or substances or combustible liquids that are permitted by the regulations in this part to be placed on board vessels, or to be on board a vessel within the navigable waters of the United States, may be accepted and transported or stored on board vessels subject to the regulations in this part when such articles are

described upon the shipper's originating shipping order or a transfer shipping paper or otherwise in writing by a shipping name as shown in the commodity list of explosives and other dangerous articles herein, and provided label notations are shown on the shipping paper as they apply to the various substances. The owner, charterer, agent, master or person in charge of a vessel shall ascertain to his own satisfaction that the outside container is one of the acceptable containers as shown in the tables for the particular substance named on the shipping paper. Shipments tendered in United States ports to vessels which are initial carriers shall not be accepted unless the originating shipping order carries the shipper's certification as to description, packing, marking, and condition as required by § 146.05-11. Shipments tendered in United States ports to vessels which are connecting carriers shall not be accepted unless the transfer shipping paper contains sufficient information to identify the preceding shipping paper. Shipments originating in a foreign port shall not be transported, carried, conveyed, or stowed by any vessel upon the navigable waters of the United States unless accompanied by bills of lading upon which the shipper or his agent has certified that the goods are described, packed and marked in accordance with the regulations in this part.

146.06-4 *Acceptance of permitted articles.*—The commodity list and the tables forming part of the regulations in this subchapter indicate the explosives and other dangerous articles and combustible liquids that are permitted to be transported, carried, conveyed, stored, stowed, or used on board any vessel. No such articles shall be transported, carried, conveyed, stored, stowed, or used on board any vessel unless they comply with the conditions as shown for the substance in the commodity list

and tables and the other provisions of the regulations in this subchapter as they apply to the particular character of vessel.

146.06-12 *Manifests required.*—All vessels transporting or storing explosives or other dangerous articles or substances, and combustible liquids, as cargo, shall have on board during the period of transportation or storage a manifest, or list, upon which is correctly described all such articles as defined by these regulations. This record may be referred to as "Dangerous Cargo Manifest" or "Dangerous Cargo List".

146.06-14 *Information required on manifests or lists.*—(a) For vessels on foreign or intercoastal voyages the dangerous cargo manifest or list shall show thereon the following information:

(1) Port and date of departure.

(2) Nationality of vessel.

(3) Name of vessel.

(4) Net tonnage of vessel.

(5) Official number (if any).

(6) Custom House number (if any).

(7) Name of master.

(8) Vessel bound for.

(9) Name of agent.

(10) Address of agent.

(b) Entries of items descriptive of the dangerous cargo on board vessels on foreign or intercoastal voy-

ages that appear upon the dangerous cargo manifest or list shall include the following information:

(1) Name of consignor.

(2) Name of consignee, or the marks and numbers when such marks and numbers are used in lieu of the consignee's name.

(3) The true shipping name as given in the commodity list of these regulations for the substance.

(4) The number and description of packages (such as barrels, drums, cylinders, boxes, etc.)

(5) The gross weight of the package.

(6) The classification of the substance in accordance with these regulations (such as Explosives, Inflammable Liquid, Compressed Gas, Hazardous Article, etc.)

(7) Such classification shall be shown in enlarged size of letter and underlined in order to be easily distinguished upon the manifest. (As an example: INFLAMMABLE LIQUID.)

(8) Kind and type of label applied to the package. If no label is required, so state.

(9) The stowage actually provided for the substance on board the vessel.

146.06-15 *Source of information shown on manifest or list.*—(a) The information required to appear on a dangerous cargo manifest or list by the provisions of §146.06-14 (b), (c) and (d) shall be the information actually furnished to the vessel by the shipper of the dangerous substances upon his bill of lading or other

shipping paper; and the owner, charterer, agent, master or person under whose supervision the actual preparation of the manifest or list is made, shall cause the information required to be correctly transcribed.

(b) Every entry made upon the dangerous cargo manifest or list shall be a true statement to the best knowledge and belief of the master of the vessel. The provision of this paragraph shall not apply to barges.

(c) The master, shall, by his signature, acknowledge the correctness of the dangerous cargo manifest or list. The provisions of this paragraph shall not apply to barges.

146.06-16 *Completeness of manifest or list.*—The dangerous cargo manifest or list shall have entered thereon every article of explosives or other dangerous articles or substances that is on board the vessel as cargo, and passenger vessels shall in addition show every article of combustible liquids in outside containers that is on board the vessel as cargo. No article of explosives or other dangerous articles or substances shall be on any vessel as cargo unless shown upon a manifest or list. No article of combustible liquid in outside containers shall be on board any passenger vessel as cargo unless shown upon the manifest or list.

146.06-19 *Cargo stowage plan or cargo stowage list.*—Vessel owners, charterers or agents shall cause to be prepared a cargo stowage plan or cargo stowage list covering each ocean going voyage of any domestic cargo vessel transporting explosives or other dangerous articles or substances and of any domestic passenger vessel transporting such explosives, or other dangerous articles or substances or combustible liquids in outside containers.

Appendix B

The cargo stowage plan or cargo stowage list shall show in all necessary detail the exact location of the stowage of such explosives, articles or substances. The descriptive name thereof as given in the commodity list herein shall be the name used to identify these explosives, or other dangerous articles or substances. Trade names, marks or other designations shall not be used to identify the dangerous cargo shown upon the stowage plan or list. When articles defined by the regulations in this part as dangerous are stowed in a compartment in which other cargo not of a dangerous nature is stowed, such other cargo that is stowed nearest adjacent to the dangerous articles of cargo shall be accurately described and identified on the stowage plan or list. At least one copy of the stowage plan or list shall be retained ashore and shall be produced in accordance with the provisions of § 146.02-22.

146.22-100 Table E.—Classification: Inflammable solids and oxidizing materials

Descriptive name of article	Characteristic properties, precautions required, markings required	Label required	Required conditions for transportation			
			Cargo vessel	Passenger vessel	Ferry vessel, passenger or vehicle	R. R. car ferry, passenger or vehicle
Calcium hypochlorite compounds, dry, containing more than 8.80% available oxygen (39% available chlorine)	Decomposed by moisture. If exposed to excessive heat, or to the rays of the sun it may decompose spontaneously evolving vapor, with sufficient pressure to rupture. The vapors from ruptured containers have been known to ignite spontaneously. When exposed gives off pungent vapors (chlorine) that are corrosive. Keep dry. May destroy textiles. Do not stow in the same compartment with corrosive liquids (white label) nor with turpentine. Stow well away from foodstuffs, living quarters, and all sources of artificial heat.	Yellow	Stowage: "On deck under cover." "Tween decks." "Under deck, but not overstowed." Outside containers: Steel barrels or drums: (ICC-6A, 6B, 6C) not over 55 gal. cap. (ICC-17E, 37D, 37E, 37F) STC, not over 55 gal. cap.	Stowage: "On deck under cover." "Tween decks readily accessible." Outside containers: Steel barrels or drums: (ICC-6A, 6B, or 6C) not over 55 gal. cap. (ICC-17E, 37D, 37E, 37F) STC not over 55 gal. cap.	Ferry stowage (AA): Outside containers: (ICC-6A, 6B, 6C) not over 55 gal. cap. (ICC-17E, 37D, 37E, 37F) STC not over 55 gal. cap.	Ferry stowage (BB): Outside containers: (ICC-6A, 6B, 6C) not over 55 gal. cap. (ICC-17E, 37D, 37E, 37F) STC not over 55 gal. cap.

Descriptive name of article	Characteristic properties, precautions required, markings required	Label required	Required conditions for transportation			
			Cargo vessel	Passenger vessel	Ferry vessel, passenger or vehicle	R. R. car ferry, passenger or vehicle
Bleaching Powder, dry, containing less than 8.80% available oxygen (39% available chlorine). Chlorinated lime (chloride of lime). (For calcium hypochlorite compounds, dry, containing more than 8.80% available oxygen (39% available chlorine) refer to "Calcium hypochlorite compounds, dry" in §146.22-100)	Decomposed by moisture or may decompose spontaneously causing evolution of heat and gases and rupture of the container. Gives off corrosive, pungent vapors (chlorine), keep dry. May destroy textiles. Do not stow in the same compartment with corrosive liquids (white label), nor with turpentine. Stow well away from foodstuffs, living quarters, and all sources of artificial heat. Increased temperature may cause pressure within the containers. Outside containers shall be marked either "Bleaching powder", "Chlorinated lime" or "Hazardous article".	No label required.	Stowage: "On deck under cover." "Tween decks" "Under deck away from heat." Outside containers: Steel barrels or drums. Tight wooden barrels or kegs. Wooden boxes WIC Fiberboard boxes, WIC.	Stowage: "On deck under cover." "Tween decks." "Under deck away from heat." Outside containers: Steel barrels or drums. Tight wooden barrels or kegs. Wooden boxes, WIC. Fiberboard boxes, WIC.	Ferry stowage (AA): Outside containers: Steel barrels or drums. Tight wooden barrels or kegs. Wooden boxes, WIC. Fiberboard boxes, WIC.	Ferry stowage (BB): Outside containers: Steel barrels or drums. Tight wooden barrels or kegs. Wooden boxes, WIC. Fiberboard boxes, WIC.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 375

THE AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,

against

UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1955

No. 375

THE AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioners recite and refer in their argument to only such items of the evidence as they deem support their position and their recitals are in some respects not acceptable to the respondent nor were they to the Courts below. As the Court of Appeals said of petitioners' somewhat similar analysis of the record there, "that was not all the evidence" (App. A, 2a). Since the questions raised by petitioners are basically factual, it is necessary to review here in some detail the evidence upon which the Courts below must have rested their decisions.

1. The SHELL BAR, with a large number of small shipments on board, sailed from New York at 4:01 P. M. on May 1, 1948 on a relatively short voyage to Havana and

Central America (Exhibit 8; F. 4, App. A, 8a)*. The shipment of 100 drums of calcium hypochlorite which petitioners unsuccessfully sought to establish as the source of the fire was stowed in number one 'tween deck (I, 48a; App. A, 2a, F. 6, 9a).

2. At 5:43 A. M. on May 3 smoke was observed coming out of the fire detection apparatus on the bridge and at the same time flames and smoke were observed coming out of the mast house ventilators leading from both No. 1 and No. 2 compartments (Exhibit D; II, 27b, 28b; F. 4, App. A, 9a). This smoke was the heavy, black ordinary smoke of a general cargo fire, not the peculiar grayish haze characteristic of decomposing calcium hypochlorite (II, 8b, 27b, 44b; App. A, 4a).

3. Twelve minutes later, No. 2 hatch—not No. 1—blew up with such force as to lift two-ton pontoons battened down with tarpaulins and cast the boatswain into the sea (II, 5b-6b, 10b-11b, 24b; F. 4, App. A, 4a, 9a). The fire in No. 2 was more difficult to extinguish and the damage there was about the same as in No. 1 (II, 26b, 29b; Exhibit 5; App. A, 4a).

4. The master was not on the bridge when the fire was discovered (II, 3b). His original report, made just after he had been called from his berth and before he had been forward, referred to the man cast overboard by the No. 2 flame blast (II, 4b, 11b), as did his report to the Coast Guard (Exhibit 20) and to respondent (Exhibit 21). The last report also noted the heavy smoke and flames from the

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* Petitioners have referred to their Appendix in the Court below as Volume I of the Record here, and to respondent's Appendix in the Court below as Volume II of the Record here. For the convenience of the Court, we shall follow the same system, using "I" for petitioners' Appendix below and "II" for respondent's Appendix below. References to "App. A" and "App. B" are to appendices to the petition. The letter "F" refers to findings of the District Court.

mast house ventilators and the immediate use of CO^2 gas in both No. 1 and No. 2 'tween decks and holds (Exhibit 21).

5. The master, chief officer and general average surveyor, testifying on the basis of all information available to them, said they could not tell where or how the fire started (II, 13b-14b, 30b, 17b-18b; I, 92a).

6. Table E of the Coast Guard Regulations (App. B, 26a) says merely that calcium hypochlorite is decomposed by moisture, or may decompose spontaneously *if* exposed to excessive heat, or to the rays of the sun. *Cf.* Petition, 6. During the voyage before the fire the temperatures had been cool and the skies overcast (Exhibit D; F. 4, App. A, 8a). The calcium hypochlorite was stowed in one of the coolest parts of the ship away from all heat (II, 75b) and her forced draft ventilation system had been in constant operation until outbreak of fire (II, 28b).

7. All witnesses on the stowage, including experts in this field, testified that it was proper and in accordance with the Coast Guard Regulations (53b-56b, 58b, 61b, 62b-65b, 69b-74b, 75b-76b). These Regulations (Table E, App. B, 26a) did not prohibit stowage of calcium hypochlorite with combustibles, as distinguished from that prescribed for a number of other commodities, including calcium chlorite dealt with immediately above calcium hypochlorite in Table E (46 CFR 146.22-100).

8. The only really qualified expert on calcium hypochlorite, the Chief Chemist of the Bureau of Explosives of the Association of American Railroads, testified that calcium hypochlorite decomposes under normal conditions, including temperatures much higher than those encountered on this voyage, at a rate of only about 1 to 5% a year (II, 34b-36b, Exhibit D) and that the drums are commonly fitted with a special gasket to allow the escape of the gases generated by decomposition (II, 39b). Petitioners' chemists agreed that the process of decomposition is "slow" or "gradual" (I, 102a; II, 22b-23b).

9. The Bureau of Explosives Chemist had made tests under conditions simulating those on the SHELL BAR, with calcium hypochlorite in direct contact with combustibles, and was unable to produce fire (II, 36b-38b).

10. The yellow labels prescribed by the Regulations (46 CFR 146.02-10, 146.05-15, 146.05-17)—the only ones which respondent's personnel should be required to direct their attention—were affixed to the drums of calcium hypochlorite. They contained no caution other than to keep away from fire, heat and open-flame lights, to remove carefully the contents of broken packages, and not to drop (Exhibit 16; I, 117a). The trade label, referred to in the petition, p. 7, was plainly a user's label, referring to "Perchloron", a trade name (II, 87b) and giving information as to use of the commodity for various purposes. It included certain warnings to the user, unrelated to stowage on a vessel (Exhibit 17; I, 119a).

11. The 100 drum shipment in question (for which recovery is sought here) was erroneously described by the shipper as "100 drums bleaching powder" (Exhibits 14 and E), but the yellow labels thereon each contained a printed certification in the precise words of § 146.05-11 (II, 117a; Exhibit 16), which was also stamped over the shipper's signature on the inland bill of lading covering consignment to respondent at its pier for ocean transportation (Exhibit 2, answer to interrogatory 2(c) and Exhibit A annexed thereto). *Cf.* Petition, 7.

12. Engagement sheets, prepared by respondent's booking department, incorporating the shipper's description of the commodities and listing separately all labeled cargo, were made available to, and customarily checked by, the stevedore (II, 48b, 88b).

13. Deck cargo lists (Exhibit A) were prepared covering highly dangerous cargo, and "special stowage" lists covering all other cargoes having any element of danger or hazard, as well as some non-dangerous items requiring

special handling. The latter list included the 100-drum shipment here under consideration under Havana cargo (Exhibit 12).

14. The stowage plan (Exhibit 11) reflected small shipments, of which there were many, in blocks indicating the character of stowage and destination. Specifically the 100-drum shipment in controversy was included on the plan in a block of Havana "Special Stow" cargo covering only a very limited area in the after-end of the No. 1 'tweendeck. The Special Stowage list, as well as a Special Cargo list (Exhibit B) and Manifest (Exhibit 8) were always available to those aboard the vessel (II, 78b, 86b), so that a ready cross-reference would show what cargo was loaded in any particular area.

15. The conduct of the master and stevedore was not affected by any lack of documents and both testified that they had adequate information (II, 84b, 86b). The master testified that he knew that yellow label cargo was stowed in No. 1 'tweendeck (II, 59b, 61b). *Cf.* Petition, 9.

16. The layout of the stowage was submitted to and approved by the master (II, 52b) and during loading of the vessel one or more of the ship's licensed deck officers were on duty and delegated to supervise loading of the cargo, including hazardous and dangerous cargo (II, 27b, 59b-60b). *Cf.* Petition, 8.

17. The master intended to have the cargo inspected during the day the fire broke out—the vessel's second full day at sea—in accordance with the Coast Guard Regulations (46 CFR 146.02-12; II, 86b).

18. Copies of the Coast Guard Regulations were made available on the ship (II, 86b) and to all shore personnel concerned with stowage (I, 53a; II, 92b, 98b), and instructions from management were uniformly to comply with them (I, 17a; II, 92b, 98b-99b) *Cf.* Petition, p. 7.

ARGUMENT

I. Reasons for Denial of the Writ:

(1) *This is essentially a fact case.*

The fact question presented to the District Judge by the cargo interests was whether the fire damage on the SS SHELL BAR was caused by respondent's "design or neglect" or "actual fault or privity", as required to permit recovery under the Fire Statute (R. S. § 4282, Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, 46 U. S. C. § 182) or the Carriage of Goods by Sea Act [49 Stat. 1210 (1936), 46 U. S. C. § 1304(2)(b)]. The concurrent findings of the District Court and the Court of Appeals on this basic issue should be accepted by this Court.

> *Coryell* v. *Phipps,* 317 U. S. 406, 411 (1943);
> *Just* v. *Chambers, Executrix,* 312 U. S. 383, 385 (1941);
> *Texas & New Orleans Railroad Company, et al.,* v. *Brotherhood of Ry. & Steamship Clerks, et al.,* 281 U. S. 548, 558 (1930) (citing cases).

The only legal point petitioners seek to raise here is that the "statutory fault" rule announced in *The Pennsylvania,* 19 Wall. 125 (1873) and applied from time to time since in collision and stranding cases, should have been applied in this fire case to satisfy petitioners' statutory burden of proof. But this is academic on the facts found below. *The Salvore,* 52 F. 2d 278, 285 (E. D. N. Y. 1931), *aff'd,* 60 F. 2d 683 (2d Cir. 1932), *cert. den.,* 287 U. S. 653.

Even in collision and stranding cases where the statutory fault rule applies, the Court is "limited to the reasonable probabilities", and where these preclude the statutory infraction having caused the accident, the Court may find

that it was not the proximate cause, without eliminating all possibilities.

Compania de Maderas de Caibarien, S. A. v. *The Queenstown Heights*, 220 F. 2d 120, 122 (5th Cir. 1955);
Seaboard Tug & Barge v. *Rederi, AB/Disa*, 213 F. 2d 772, 775 (1st Cir. 1954);
The Mabel, 35 F. 2d 731, 732 (2nd Cir. 1929);
Cf. The Umbria, 166 U. S. 404, 419 (1897).

Petitioners recognize this limitation by predicating their first and principal question on the assumption that there was a fire "*which may well have been caused* by the carrier's violation of the statute and regulations" (emphasis ours)—an assumption contrary to the decisions of both the District Court and the Court of Appeals (App. A, 7a, 11a).* These decisions, based on *all* the evidence, would prevent consideration of the legal question now sought to be raised by petitioners.

(2) *There is no conflict between circuits.*

Far from conflicting with decisions of other circuits, the decisions below are in strict accordance with the traditional interpretation of the Fire Statute and the Congressional intent which it reflects.

Consumers Import Co. v. *Kabushiki Kaisha*, 320 U. S. 249 (1943);
The Galileo, 54 F. 2d 913, 916 (2nd Cir. 1931), *aff'd sub nom. Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420 (1932);

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* In finding that "in any event" there was "lack of evidence that any statutory fault was the proximate cause of the fire" (App. A, p. 7a), the Court of Appeals scarcely could have "misapprehended" the statutory fault rule (Petition, p. 16), especially since it had just referred to the "presumption" that that rule, if applicable, may supply (App. A, p. 7a).

The Rio Gualeguay, 102 F. Supp. 861, 865 (E. D. La. 1952), *aff'd*, 205 F. 2d 886 (5th Cir. 1953), *cert. den.*, 346 U. S. 915;

Hoskyn & Co. v. *Silver Line*, 143 F. 2d 462, 463 (2nd Cir. 1944), *cert. den.*, 323 U. S. 767.

The Denali case, 105 F. 2d 413 (9th Cir. 1939), reargued, 112 F. 2d 952 (1940), *cert. den.*, 311 U. S. 687, stoutly relied upon by petitioners, is no more authority for their position than other stranding or collision cases where the statutory fault rule has been applied—some of which are cited at page 14 of the petition. No fire was involved and the Court of Appeals took pains to point out that the burden of proof under the Limitation Statute (R. S. § 4283 as amended, 46 U. S. C. 183) and under the Harter Act (27 Stat. 445 (1893), 46 U. S. C. §§ 190-195) is on the vessel-owner rather than cargo, all of which is of course contrary to the Fire Statute, where cargo has the affirmative burden of establishing that the fire was due to the vessel-owner's "design or neglect" or "actual fault or privity". The testimony in the instant case as to the lack of causal connection would alone distinguish it from *The Denali* (see original opinion, 105 F. 2d 413, 419).

Hines v. *Butler* (*The Virginia*), 278 Fed. 877 (4th Cir. 1921), *affirming* 264 Fed. 986 (D. C. Md. 1920), *cert. den.*, 257 U. S. 659, did not rest on any theory of statutory fault, but on the ground that the loss of cargo by fire was occasioned by reason of the shipowner's proven, not presumptive, "neglect".

Thus no conflict between circuits has been established. On the contrary, the decisions are uniformly in accord with that of the Court of Appeals here.

(3) *Policy considerations are against allowance of the writ.*

The statutory protection of shipowners from liability for fire damage to cargo dates back to at least 1786 in England and to 1851 here. *Consumers Import Co.* v. *Kabu-*

shiki Kaisha, 320 U. S. 249, 254 (1943), n. 12; *Providence, etc., S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 602 (1883).

The statute has been uniformly interpreted by the Courts and understood by shipowners, shippers and insurance interests alike. Investments have been made and risks have been calculated by the interested parties and their insurers on the basis of these interpretations and understandings, which should not at this late date be upset by so drastic a change as the petitioners advocated below and are advocating here.

The Fire Statute was enacted for the definite purpose of protecting shipowners from excessive and unpredictable liabilities for losses to cargo (not loss of life or injury), *Consumers Import Co.* v. *Kabushiki Kaisha* (*The Venice Maru*), 320 U. S. 249 (1943). Nevertheless, contrary to petitioners' suggestion (Petition, p. 3), courts have not been loath to impose liability where requisite facts have been developed. See, *e.g.*, *The Edmund Fanning*, 201 F. 2d 281 (2nd Cir. 1953) and *Great Atlantic & Pacific Tea Co.* v. *Brasileiro*, 159 F. 2d 661 (2nd Cir. 1947), *cert. den.*, 331 U. S. 836, both decided after the *Consumers Import* case. *Cf.* Petition, p. 13.

II. The Petitioners' Questions:

1. *As to Question No. 1:*

For over a hundred years our Courts have consistently resisted attempts to whittle down or dilute the statutory immunity provided by the Fire Statute. By its 1936 enactment of the Carriage of Goods by Sea Act (49 Stat. 1207, 1210 (1936), 46 U. S. C. §§ 1304(2)(b)) Congress not only reaffirmed the protective benefits of the Fire Statute, but extended them to a "carrier", though it might not be a shipowner or owner *pro hac vice*. Against this statutory background the petitioners have failed to cite a single fire case in which the statutory fault principle advocated here

has been applied. Petitioners' argument here was rejected in *The Rio Gualeguay*, 205 F. 2d 886, 888 (5th Cir. 1953), *cert. den.*, 346 U. S. 915.

It is plain that the views advocated by petitioners would emasculate the Fire Statute for they would result in requiring the shipowner to assume the very burden intended by the Fire Statute to be cast solely on the cargo interests. Since the statute itself deals with this burden, the question may not be lightly dismissed, as petitioners would seek to do, by saying that it is one of evidence rather than substance.

Moreover, it is plain that the extension of the statutory fault rule in the manner urged by petitioners would be at odds with the long line of decisions here and in the Courts below. Delinquencies on the part of shipowners, much more serious than the alleged lack of compliance with the Coast Guard Regulations here involved, have been repeatedly held not to relieve cargo interests from satisfying the burden cast upon them by the statute. For example, the shipowner's failure to fulfill his primary and most important duty of making the vessel seaworthy deprives him of defenses provided for by the Harter Act (*May* v. *Hamburg etc. Gesellschaft*, 290 U. S. 333 (1933)), but does not deprive him of his defense under the Fire Statute or even shift the statutory burden of proof. *Hoskyn & Co.* v. *Silver Line*, 143 F. 2d 462 (2d Cir. 1944), *cert. den.*, 323 U. S. 767; *Earle & Stoddart* v. *Wilson Line (The Galileo)*, 287 U. S. 420, 427 (1932). Similarly, a deviation, though regarded as so serious as to strip the shipowner or carrier of bill of lading defenses and make him an insurer, does not deprive him of the Fire Statute protection or lessen the burden of proof cast upon the cargo. *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134, 145 (4th Cir. 1952), *cert. den.*, 345 U. S. 992; *Globe and Rutgers Fire Ins. Co.* v. *United States*, 105 F. 2d 160, 166 (2nd Cir. 1939), *cert. den.*, 308 U. S. 611; *The Ida*, 75 F. 2d 278, 279 (2nd Cir. 1935); see also *Haroco Co., Inc.* v. *The Tai Shan*,

111 F. Supp. 638, 645 (S. D. N. Y. 1953), *aff'd on opinion below*, 218 F. 2d 822 (2nd Cir. 1955); *The Venice Maru*, 39 F. Supp. 349, 353 (S. D. N. Y. 1941), *aff'd*, 133 F. 2d 781 (2nd Cir. 1943), *aff'd sub nom. Consumers Import Co.* v. *Kabushiki Kaisha*, 320 U. S. 249 (1943).

It would indeed be incongruous to grant the statutory immunity to a shipowner guilty of breach of his warranty of seaworthiness or deviation, while denying it to one guilty of non-compliance with some Coast Guard or similar regulation having at minimum no probable causal connection.

2. *As to Question No. 2:*

Petitioners' Question No. 2, not briefed below, is premised upon contentions and assumptions not accepted by the Courts below.

Neither Court found any impropriety in the stowage and there was no factual basis for any such finding since all stowage experts agreed that the stowage was in all respects proper and in compliance with the Coast Guard requirements. There being no impropriety in the stowage under the Regulations or otherwise, no liability can be predicated on the sole basis that the calcium hypochlorite was in the same compartment with other cargo destroyed in the fire and was not isolated from all other cargo on the ship. Under the circumstances, its status was the same as any combustible cargo which could have contributed to the loss in the event of an existing fire.

This case is in no sense comparable to *Hines* v. *Butler*, 278 Fed. 877 (4th Cir. 1921), where the Court found that cargo had succeeded in establishing that the shipowner's "design or neglect" in failing to properly maintain the fire fighting equipment was the direct, and so far as appears, the sole cause of the loss of cargo.

3. *As to Question No. 3:*

Petitioners' Question No. 3 is again related to factual matters upon which there are concurrent findings of two Courts, which should be accepted here.

Conditions on the SHELL BAR up until the outbreak of the fire were not such as to give rise to any fire risks in connection with the item of calcium hypochlorite. The only reliable expert testified, on the basis of actual experiments, that the stowage of that commodity with other cargo in the vicinity gave rise to no special hazards. Indeed, the inference must rather clearly be that the calcium hypochlorite *did not* cause the fire.

References to statements contradicted by others or by actual testimony at the trial and not accepted by the Courts below, are scarcely an appropriate ground for the writ requested. What petitioners seek and sought below is that favorable inferences be drawn from selected items of the record. The Courts below on the basis of the whole record refused to draw such inferences. Any questions of credibility based on any inconsistencies between oral testimony and prior statements were for the Trial Court. *Borcich* v. *Ancich*, 191 F. 2d 392, 395 (9th Cir. 1951), *cert. den.*, 342 U. S. 905 (1952); *The Catalina*, 95 F. 2d 283, 285 (9th Cir. 1938).

As was said in *The Strathdon*, 101 Fed. 600, 606 (2d Cir. 1900): "The occult causes of fire are as numerous as they are mysterious". Since Congress has imposed upon cargo interests a burden which, in this situation, must include proof of the cause of the fire, there is no occasion for speculating as to other causes as consistent, or more consistent, with all of the actual facts than the one singled out by petitioners here.

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

New York, N. Y., September 23, 1955.

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